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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROY RUSS,

Defendant and Appellant.

F056349

(Super. Ct. No. FP003542A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Kari L. Ricci, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

PROCEDURAL AND FACTUAL BACKGROUND

On April 8, 1988, appellant, Roy Russ, pled guilty to committing a lewd and lascivious act on a child under age 14 (Pen. Code, § 288, subd. (a)). On June 29, 2007, the prosecutor filed a petition seeking to have appellant committed as a sexually violent predator (SVP) pursuant to Welfare and Institutions Code, section 6600.[1]

Psychological Reports

Dr. Thomas R. MacSpeiden, a clinical psychologist, prepared a report dated June 30, 2007, that was attached to the petition. Dr. MacSeiden stated that appellant's offense qualified as a SVP offense under section 6600.[2] The victim of appellant's offense was 13 years old when she was raped by appellant. Appellant was paroled several times and charged with rape after three of his releases. All three incidents were treated as parole violations and appellant was recommitted to prison.

Dr. MacSpeiden's testing of appellant showed a severe level of psychopathy and an antisocial lifestyle when compared to other prison inmates. Appellant's psychopathic characteristics included pathological lying, manipulative behavior, lack of remorse, and failure to accept responsibility. Appellant also showed impulsivity, poor behavior controls, and a parasitic lifestyle. Appellant is paranoid, though Dr. MacSpeiden attributed this trait to appellant's projection to free himself of responsibility rather than a psychotic process. Dr. MacSpeiden noted appellant was declared a Mentally Disordered Offender at Atascadero State Hospital.

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[1] Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

[2] Section 6600, subdivision (b) enumerates section 288 as a sexually violent offense.

Dr. MacSpeiden diagnosed appellant with paraphilia, not otherwise specified (sexual activity with non-consenting persons) and antisocial personality disorder. Dr. MacSpeiden gave appellant the Static-99 test to establish a baseline level of risk that appellant would commit another sexually oriented offense. Appellant scored a 6 on the Static-99, placing him in the high-risk category for being convicted of another sexual offense. Dr. MacSpeiden concluded appellant is predisposed to commit violent sexual offenses, representing a substantial danger of reoffending if free. Appellant meets the criteria of a SVP as described in section 6600.

Dr. Dawn Starr, a clinical psychologist, prepared a report dated June 20, 2007. Dr. Starr noted appellant's conviction of Penal Code section 288 was a qualifying SVP conviction. Dr. Starr noted appellant violated parole by committing a sexual assault in 1991 and recounted in detail one of appellant's sexual attacks on a victim after he had been released on parole in 1992. Dr. Starr noted appellant had been treated for mental illness in the past but denied having mental health problems.

Dr. Starr diagnosed appellant with paraphilia, not otherwise specified – defined as recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors which involve non-human subjects or the suffering or humiliation of oneself or one's partners, and/or that involve children or other non-consenting persons. Appellant repeatedly engages in behaviors involving non-consensual sex. He demonstrates volitional impairment despite knowing he could get into trouble. Dr. Starr found appellant is an "SVP statutorily-defined diagnosed mental disorder, which is defined as a congenital or acquired condition affecting emotional or volitional capacity that predisposes an individual to the commission of criminal sexual acts, to the degree that he is a menace to the health and safety of others."

Dr. Starr administered the Static-99 and found appellant scored a 7, placing him in the high range of risk for future sexual offense. Dr. Starr concluded appellant was likely

to engage in sexually violent predatory criminal behavior and is an SVP as described in section 6600. On July 16, 2007, the trial court found probable cause for the allegations in the petition. On May 23, 2008, the trial court granted appellant's motion to represent himself after advising appellant of the dangers and disadvantages of self-representation. The court found appellant knowingly and intelligently elected to represent himself.

SVP Hearing

The hearing to determine whether appellant is an SVP was conducted on August 26, 2008. Dr. Starr testified that she specializes in forensic evaluations of SVP's under section 6600. Dr. Starr reviewed appellant's criminal history, including the qualifying conviction and the allegations of sexual offenses while appellant was on parole. Appellant had no significant work history and had not pursued educational or vocational training. Appellant had previously reported auditory and visual hallucinations and was described as having paranoid beliefs. Appellant had previously been medicated with Risperdal and Seroquel. More recently, appellant had not made those complaints.

Appellant wrote letters to prosecutors asserting he was being persecuted. Appellant asserted women loved to be with him even after learning he was labeled as a child molester. Dr. Starr diagnosed appellant as having an SVP statutorily-defined mental disorder. Appellant has paraphilia not otherwise specified and an antisocial personality disorder. Appellant has used a lot of force and violence against females. He was repeatedly caught and sanctioned and still has serious difficulty controlling himself. Appellant appears to be aroused by forcing people to have sex against their will.

Appellant fails to show empathy for any of his victims. He suffers also from a paranoid delusional disorder. Dr. Starr diagnosed appellant with paranoia not otherwise specified. Appellant's paraphilia and antisocial personality disorder qualify him as an SVP. Using the Static-99 test, an evaluative tool like an actuarial instrument, Dr. Starr found appellant scored a 7. Dr. Starr explained her findings in detail. Dr. Starr explained

that a score of 7 placed appellant in the highest risk category for reoffending. Dr. Starr said appellant was also at a higher risk of reoffending because he had no protective factors pertaining to his high level of sexual deviance. Adding to appellant's risk for reoffending are his mental health problems and his feeling that he does not need treatment for any of his problems.

At the conclusion of the hearing, the trial court found true beyond a reasonable doubt that appellant sustained a conviction for a sexually violent offense and that appellant had two mental disorders: paraphilia not otherwise specified and a psychotic disorder not otherwise specified. The court found beyond a reasonable doubt that appellant was an SVP pursuant to section 6600 not amenable to treatment, ordering appellant's commitment to State Department of Mental Health for an unspecified term.

Appellant challenges the constitutionality of the Sexually Violent Predator Act (SVPA) on due process, ex post facto, and equal protection grounds.

DISCUSSION

I. Due Process

Russ claims that the SVPA as modified denies him due process of law under the federal Constitution because the statute as amended eliminated certain procedural safeguards, including the limited duration of the commitment, periodic judicial review, a requirement that the state prove a need for continued commitment beyond a reasonable doubt, and the right to experts at state expense. We previously have decided these issues in a manner that is unfavorable to Russ's position. (*People v. Garcia* (2008) 165 Cal.App.4th 1120 (*Garcia*) (review granted Oct. 16, 2008, S166682.) These issues are pending before the California Supreme Court. Review has been granted in *People v. McKee* (2008) 160 Cal.App.4th 1517 (*McKee*) (review granted July 9, 2008, S162823); *People v. Johnson* (2008) 162 Cal.App.4th 1263 (review granted Aug. 13, 2008, S164388); *Garcia*, *supra*, 165 Cal.App.4th 1120 (review granted Oct. 16, 2008,

S166682); *People v. Riffey* (2008) 163 Cal.App.4th 474, 486-489 (review granted Aug. 20, 2008, S164711); and *People v. Boyle* (2008) 164 Cal.App.4th 1266 (review granted Oct. 1, 2008, S166167).

Our conclusion in *Garcia* that the SVPA complies with due process is consistent with numerous state appellate decisions and United States Supreme Court precedent.[3] As we observed in *Garcia*, section 6605 provides that a current mental health examination shall be conducted each year to determine whether the person currently meets the definition of an SVP. (§ 6605, subd. (a).) The results are to be filed with the court and served on the committed person. (*Ibid*.) If it is determined that the person no longer meets the definition of an SVP, or if the person can be conditionally released, then a petition for this type of discharge or conditional release is to be filed. (§ 6605, subd. (b).) At the hearing on this petition, the committed individual has the right to appointed counsel, the right to a jury trial, and the right to an appointed expert. (§ 6605, subd. (d).)

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3 There is United States Supreme Court authority holding that an initial civil commitment for an indefinite term does not violate due process merely because it is indefinite. (See *Jones v. United States* (1983) 463 U.S. 354, 368-369 [statute providing for indefinite commitment of criminal defendant acquitted by reason of insanity and requiring defendant to prove by preponderance of evidence that he is no longer insane or dangerous in order to be released does not violate due process]; see also *Kansas v. Hendricks* (1997) 521 U.S. 346 (*Hendricks*) [upholding Kansas Sexually Violent Predator Act, which provided for commitment until mental abnormality or personality disorder has so changed that committed person no longer dangerous]; see also *Foucha v. Louisiana* (1992) 504 U.S. 71, 76-77 [indefinite civil commitment consistent with due process if commitment statute provides fair and reasonable procedures so that person is held only as long as he is both mentally ill and dangerous].)

If the Department does not certify that the person should be discharged or conditionally released, the committed person can file a petition seeking conditional release or discharge. (§ 6608, subd. (a).) Section 6608, subdivision (i), provides that, in any hearing on a petition filed under this section, the petitioner has the burden of proof by a preponderance of the evidence.

Additionally, the state has the burden of proving beyond a reasonable doubt that the SVP is to remain committed. (*Ibid*.) If at any time the Department has reason to believe the person committed is no longer an SVP, it must seek judicial review of the commitment. (§ 6605, subd. (f).)

We observe that, due to the requirement of an annual review, the commitment period is "only potentially indefinite." (*Hendricks*, *supra*, 521 U.S. at p. 364.) The annual review and the numerous methods by which a committed person may seek discharge or conditional release under California's scheme (§ 6608) assures that an individual remains committed only as long as he or she meets the statutory definition of an SVP and that constitutional requirements are satisfied. (See *Hendricks*, *supra*, 521 U.S. at pp. 364-365.)

In addition, an SVP commitment proceeding is civil in nature. (*People v. Collins* (2003) 110 Cal.App.4th 340, 348.) Although a defendant in an SVP proceeding is entitled to due process, the protections afforded are measured by the standard applicable to civil, not criminal, proceedings. (*Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 738.) Due process is a flexible concept calling for whatever procedural protections a particular situation demands. (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1399.) Rules of civil procedure apply to petitions for discharge or conditional release filed by an SVP pursuant to section 6608. (*People v. Collins*, *supra*, 110 Cal.App.4th at p. 348.) Further, the burden of proof falls on the moving party and is by a preponderance of the evidence. (*Ibid*.; § 6608, subd. (i); Evid. Code, § 115.)

The constitutionality of the statutory scheme adopted by California for treating SVP's, including the assignment of the burden of proof, has been upheld by the California Supreme Court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138

(*Hubbart*).[4] *Hubbart* comprehensively summarized the many provisions in the scheme and observed that a person filing a petition for discharge or conditional release has the burden of proof by a preponderance of the evidence. (*Id*. at p. 1148 & fn. 14.) The *Hubbart* court then analyzed and rejected a due process challenge to the statutory scheme. (*Id*. at pp. 1151-1167.)

Having rejected each of the due process challenges made by Russ in our decision in *Garcia*, we reject them here for the same reasons.

II. Ex Post Facto

Russ claims that the SVPA is unconstitutional. He contends it violates ex post facto rules. As we have already stated, it is well settled that a commitment under the SVPA is civil in nature and legally does not amount to punishment. (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1231-1232; see also *Hubbart*, *supra*, 19 Cal.4th at p. 1179 [SVPA did not violate constitutional proscription against ex post facto laws because SVPA does not impose punishment or implicate ex post facto concerns]; *People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2 [since SVPA not punitive and does not impose liability or punishment for criminal conduct, double jeopardy and cruel and unusual punishment claims fail]; see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 266-267 [basic purpose of ex post facto clause is to ensure fair warning of consequences of violating penal statutes and to reduce potential for vindictive legislation].)

All of the cases cited above interpret the SVPA prior to its amendment calling for an indefinite term. Russ argues that the indefinite term makes the current version of the SVPA particularly punitive. This is the same argument that was rejected in *Garcia*,

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[4] We note the trial court made its findings applying the beyond a reasonable doubt standard.

McKee, and the other cases currently pending review. We continue to adopt the reasoning of these cases, which unanimously have held that the indefinite term of commitment does not itself convert a civil commitment under the SVPA to a punitive confinement. Double jeopardy, ex post facto rules, and the rule against cruel and unusual punishment are constitutional guarantees applicable only to criminal cases -- not to civil commitments under the SVPA.

III. Equal Protection

Russ also claims that the SVPA violates the equal protection clause of the state and federal Constitutions because it treats sexual offenders who suffer from a mental disorder differently than those offenders with mental disorders who do not commit sexual offenses, including those individuals committed pursuant to the Mentally Disordered Offender Act (MDOA) (Pen. Code, § 2960, et. seq.) (mentally disordered offenders or MDO's), and those individuals committed to the Department of Mental Health after being found not guilty of a crime by reason of insanity (NGI's) (Pen. Code, § 1026, et. seq.). According to Russ, because the classification scheme affects a fundamental right -- liberty -- the legislative classification scheme is subject to strict scrutiny and must be tailored narrowly to further a compelling state interest. (See *People v. Olivas* (1976) 17 Cal.3d 236, 243 [in cases involving suspect classifications or touching on fundamental interests, state bears burden of establishing compelling interest justifying law]; *People v. Green* (2000) 79 Cal.App.4th 921, 924 [strict scrutiny appropriate standard when measuring claims of disparate treatment in civil commitment].)

SVP's are treated differently than other civil commitments. For example, SVP's are subject to an indefinite commitment while MDO's are limited to one-year renewable terms. NGI's may petition for release after 180 days of commitment, and the court may not summarily reject their petition. (Pen. Code, § 1026.2, subds. (a) & (d); *People v. Soiu* (2003) 106 Cal.App.4th 1191, 1197-1198.) A court may summarily reject a petition filed

by an SVP upon a finding that the petition is frivolous. (§ 6608, subd. (a).) SVP's, however, are not similarly situated to persons committed under other civil commitment statutes since, under section 6606, subdivision (b), the SVPA acknowledges that persons committed pursuant to its authority may have mental disorders that will never successfully be treated.[5] (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1163; see also *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1209, 1226.) In contrast, the law anticipates that those individuals committed under the MDOA and Penal Code section 1026 will be restored to sanity or, at the least, be able with treatment to keep their mental disorders in remission. (Pen. Code, §§ 2962, 1026.2.) If persons are not similarly situated for purposes of the law, an equal protection claim fails at the outset. (*People v. Buffington, supra,* 74 Cal .App.4th at p. 1155.) We agree with the reasoning and conclusion reached in *Garcia*, and consequently reject Russ's equal protection argument.

DISPOSITION

The commitment order is affirmed.

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[5] Section 6606, subdivision (b) states: "Amenability to treatment is not required for a finding that any person is a person described in Section 6600 [i.e., an SVP], nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program."